A

BERJAYA BOOKS SDN BHD & ORS

v.

JABATAN AGAMA ISLAM WILAYAH PERSEKUTUAN & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
ZALEHA YUSOF J
[JUDICIAL REVIEW NO: 25-137-06-2012]
23 MARCH 2013

C

ADMINISTRATIVE LAW: *Judicial review - Jurisdiction of High Court – Seizure of books during raid - Prohibition order only issued three weeks after raid - Third applicant arrested and charged under s. 13 of Syariah Criminal Offences (Federal Territories) Act 1997 - Application* D *for judicial review against decisions of first respondent in raiding and searching premises of first applicant - Whether seizure of publications lawful - Whether High Court has jurisdiction to hear application*

CONSTITUTIONAL LAW: *Federal and state law - Conflict - Matters of Islamic law - Seizure of books during raid - Third applicant* E *arrested and charged under s. 13 of Syariah Criminal Offences (Federal Territories) Act 1997 - Matters pertaining to publications, printing and printing presses - Power of state to create and punish offences by persons professing the religion of Islam against precept of Islam except in matters* F *in Federal list - Whether s. 13 of Syariah Criminal Offences (Federal Territories) Act 1997 ultra vires of Federal Constitution - Whether there were elements of mala fide in respondents' action*

The first respondent's officers had raided the Borders Bookstore at The Gardens, Midvalley and seized several books titled 'Allah, G Kebebasan dan Cinta' and 'Allah, Liberty and Love' ('the publications') which were written by Irshad Manji. At the material time, the publications were not subjected to any prohibition order by the Ministry of Home Affairs ('KDN'). A prohibition order was only issued three weeks after the raid. The second and third H applicants, along with a Borders' employee attended the first respondent's office to assist with the latter's investigations. The second applicant is a non-Muslim while the third applicant is a Muslim. However, the third applicant was arrested on that day and the first respondent insisted that it would prosecute the third I applicant under s. 13 of the Syariah Criminal Offences (Federal

Territories) Act 1997 ('Act 559') for the offence of disseminating/distributing, by way of selling of publications deemed contrary to Islamic law. Hence, in the present application, the applicants applied for a judicial review against the decisions of the first respondent in (i) raiding and searching the premises of the first applicant; (ii) seizing the publications; (iii) examining the applicant's employees; and (iv) in arresting and prosecuting the third applicant. In support of their application, the applicants argued (i) that the respondents could not imply that the Syariah Court had jurisdiction merely because there is s. 13 of Act 559 which allows them to take enforcement actions when similar offence had been legislated in s. 7 of the Printing, Presses and Publications Act 1984 ('Act 301'). The applicants further argued that Act 301 was legislated pursuant to item 21 of List 1 of the Ninth Schedule read together with art. 74(1) of the Federal Constitution and therefore, it has superior legislative capacity as compared to Act 559 which is only applicable to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and (ii) what amounts to contrary to Islamic law under s. 13 of Act 559 is ambiguous and wide. The offence specified under s. 13 of Act 559 which is a legislation of an offence against the precepts of Islam is a legislation upon religious doctrine and is not criminal *per se*. The issues that arose for the court's determination were (i) whether this court has jurisdiction to hear the application; and (ii) whether the respondents' action against the applicants was lawful.

Held (allowing application):

(1) The court has a supervisory power over the decision and act of those bodies like the respondents in this case. The offence proscribed by s. 13 of Act 559 is not exclusively within the jurisdiction of the Syariah Court but can also be found in s. 7 of Act 301. While Act 559 applies only to the Federal Territories of Kuala Lumpur and Labuan and to people professing the religion of Islam, Act 301 applies throughout and beyond Malaysia. It applies to every person irrespective of race, sex or religion. The court has clear jurisdiction to hear the application under O. 53 of the Rules of Court 2012. The question of the encroachment into the jurisdiction of Syariah Court did not arise at all (paras 14, 21 & 26)

(2) Section 1(2) of Act 559 clearly provides that the Act shall apply to 'persons professing the religion of Islam'. Although the word 'persons' is not defined, the word 'Muslim' is defined under s. 2 of the Administration of Islamic Law (Federal Territory) Act 1993 ('Act 505'). Section 46 of Act 505 clearly states that it confers criminal and civil jurisdiction to the Syariah High Court over Muslims only. Since Syariah laws are not applicable to non-Muslims, the action taken by the first respondent against the first and second applicants were clearly unlawful and in excess of their powers. The action was also irrational as to how they could investigate the second applicant in relation to an offence pertaining to publications contrary to Islamic law despite being aware that the second applicant was a non-muslim and therefore could not be assumed to have sufficient knowledge of Islamic law or of what is contrary to Islamic law. (paras 27, 28 & 31)

(3) Even though the third applicant was a Muslim, she was merely a store manager and the actual person who was responsible for the selection of titles and range of stock of books and publications displayed and sold in the first applicant's bookstore was the second applicant and not her. Being subordinate to the second applicant, she had no authority whatsoever to decide on the selection or distribution of any books or publication in the first applicant bookstore; and yet the first respondent continued to prosecute even when this was made known to them during the investigation. This clearly showed that the respondent's decisions and exercise were so unreasonable and irrational. (paras 34 & 35)

(4) Matters pertaining to publications, printing and printing presses fall within item 21 of List 1 of the Ninth Schedule read together with art. 74 of the Federal Constitution. By virtue of item 1 of List II of the Ninth Schedule, the state is given power to create and punish offences by persons professing the religion of Islam against precept of Islam, except in regard to matters included in the Federal list. Validity of s. 13 of Act 559 is questionable as it seems to be *ultra vires* Act 301 and the Federal Constitution. Even if it is a valid law, what amounts to 'contrary to Islamic law' as provided by the provision is also questionable as it is too wide. (paras 36 & 37)

(5) At the material time, the publication or book in question was not subject to any publications order by KDN. The publication order was issued only three weeks after the raid. Section 13 of Act 559 must be in conformity with art. 7 of the Federal Constitution which provides that no person shall be punishable for an act or omission which was not punishable by law when it was done or made. A statute must be read harmoniously with the Federal Constitution to avoid any conflict between them which will result in the statute becoming void. Therefore, the Act must be read prospectively to prevent those similarly circumstanced from being retrospectively criminally liable. (para 37)

(6) There is nothing in Act 559 which provides for any state religious bodies to prohibit any publication. It only creates an offence of publication. In order to follow and adopt a harmonious interpretation of the laws, the only logical approach is for s. 7 of Act 301 to support s. 13 of Act 559, by way of notification to the public first then only the enforcement action. Such approach would be harmonious and would avoid any tension, controversy and conflict in the society and law. (para 38)

(7) The applicants had shown existence of illegality, abuse of discretionary powers, irrationality, unreasonable exercise of power, unconstitutionally and that there existed procedural impropriety on the part of the respondents. There were elements of *mala fide* in the handling and carrying out of the actions of the respondents. (para 42)

Case(s) referred to:

Abdul Kahar Ahmad v. Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Interveners) [2008] 4 CLJ 309 FC ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Counsel of Civil Service Unions v Minister for the Civil Service [1985] AC 374 ***(refd)***

Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister Of Home Affairs), Malaysia [1969] 1 LNS 65 FC ***(refd)***

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(foll)***

Multi-Purpose Holdings Berhad v. Ketua Pengarah Hasil Dalam Negeri [2006] 1 CLJ 1121 CA ***(foll)***
Potensi Bernas Sdn Bhd v. Datu Badaruddin Datu Mustapha [2009] 8 CLJ 573 HC ***(refd)***
Siti Hasnah Vangarama Abdullah v. Tun Dr Mahathir Mohamad & Ors [2012] 7 CLJ 845 CA ***(refd)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(foll)***
Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases [2009] 2 CLJ 54 FC ***(refd)***
Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565 FC ***(foll)***

Legislation referred to:
Administration of Islamic Law (Federal Territory) Act 1993, ss. 2, 46
Federal Constitution, arts. 74, 121(1A)
Printing, Presses and Publications Act 1984, s. 7(1)
Rules of Court 2012, O. 53
Syariah Criminal Offences (Federal Territories) Act 1997, ss. 1(2), 13

Other source(s) referred to:
MP Jain, *Administrative Law of Malaysia and Singapore*, 3rd edn, p 665

Reported by Najib Tamby

JUDGMENT

Zaleha Yusof J:

[1] The first applicant owns the Borders Bookstore (Borders), an internationally renowned chain of bookstores. The second applicant is Borders' General Manager of Operations and Merchandising, who is responsible for the selection of titles range of stock of books and publications displayed and sold in Borders. The third applicant is a Borders' employee, who is assigned as the store manager for the Borders branch in The Gardens, Midvalley.

[2] The application for judicial review by the applicants in this instance is against the decisions by the first respondent, Jabatan Agama Islam Wilayah Persekutuan, in raiding and searching the premises of the first applicant and seizing publications therein and examining the first applicant's Muslim and non-Muslim employees on 23 May 2012 and in arresting the third applicant on 30 May 2012 and prosecuting the third applicant on 19 June 2012.

Background Facts

[3] On 23 May 2012, the first respondent's officers accompanied by a group of reporters and photographers raided the Borders Bookstore at The Gardens, Midvalley. During the raid, the first respondent's officers seized several books by an international writer, Irshad Manji, titled "*Allah, Kebebasan dan Cinta*" and "*Allah, Liberty and Love*" ("publications"). At the material time, the publications were not subject to any prohibition order by the Ministry of Home Affairs (KDN). The first respondent's officers proceeded to examine the Muslim and non-Muslim employees of Borders, and issued orders compelling them to be further subjected to investigation and examination.

[4] On 29 May 2012, KDN made a prohibition order *vide* Gazette Notification PU(A) 162 known as Printing Presses and Publications (Control of Undesirable Publication) (No 3) Order 2012 ("the said prohibition order") and issued on 14 June 2012, three weeks after the raid. As ordered by the first respondent, the second applicant, the third applicant and another Borders' employee, Farihna Mohamed Fadhlullah, attended the first respondent's office on 30 May 2012 to assist with their investigations and to be examined. Though the second applicant is a non-Muslim, in the spirit of co-operation Borders still directed him to be examined.

[5] However, the third applicant was arrested on that day, 30 May 2012. The applicants made various representations to first respondent, the Minister of KDN, the second respondent and Minister Hal Ehwal Islam, third respondent, but the first respondent still insisted that it would prosecute the third applicant under s. 13 of the Syariah Criminal Offences (Federal Territories) Act 1997 for the offence of disseminating/distributing by way of selling publications deemed contrary to Hukum Syarak ("Islamic Law"). Hence, this application.

Reliefs Sought

[6] The following are the reliefs sought by the applicants:

(a) suatu Perintah *Certiorari* membatalkan tindakan keputusan oleh pegawai-pegawai Jabatan Agama Islam Wilayah Persekutuan ("JAWI") dalam menyerbu, menggeledah, merampas dan menyita bahan terbitan di premis Pemohon

Pertama dan memeriksa pekerja-pekerja Pemohon Pertama pada 23.5.2012 dan juga Perintah Hadir Memberi Keterangan Mengikut seksyen 58(1) Akta Prosedur Jenayah Syariah (Wilayah-Wilayah Persekutuan) 1997 ("Akta Prosedur 1997") bertarikh 23.5.2012 terhadap pekerja-pekerja Pemohon Pertama iaitu Stephen Fung Wye Keong dan Nik Raina binti Nik Abdul Aziz yang merupakan Pemohon Kedua dan Pemohon Ketiga ("Tindakan JAWI") dan suatu Perintah *Mandamus* supaya JAWI mengemukakan semua rekod dan dokumen berkenaan Tindakan JAWI kepada Mahkamah Yang Mulia ini untuk disemak supaya JAWI diarahkan menarik balik dan membatalkan Tindakan JAWI tersebut;

(b) suatu Perintah *Certiorari* membatalkan keputusan tangkapan, Bon Diri bertarikh 30.5.2012 dan tindakan pendakwaan oleh JAWI terhadap Pemohon Ketiga dan selanjutnya suatu Perintah *Mandamus* supaya JAWI mengemukakan semua rekod dan dokumen berkenaan tangkapan, Bon Diri dan suratcara pendakwaan terhadap Pemohon Ketiga kepada Mahkamah Yang Mulia ini untuk disemak supaya JAWI diarahkan menarik balik dan membatalkan tangkapan, Bon Diri dan pendakwaan terhadap Pemohonon Ketiga;

(c) suatu deklarasi bahawa Akta Kesalahan Jenayah Syariah (Wilayah-Wilayah Persekutuan) 1997 ("AKJS 1997") dan Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993 ("Akta Pentadbiran 1993") adalah akta-akta yang hanya terpakai kepada orang Islam sahaja dan selanjutnya peruntukan tatacara dan prosedur untuk perlaksanaan akta-akta tersebut yang terkandung dalam Akta Prosedur 1997 juga terpakai ke atas orang Islam sahaja;

(d) suatu deklarasi bahawa oleh kerana AKJS 1997 tidak mempunyai peruntukan melarang bahan terbitan yang melanggar hukum Syarak, maka sebarang tindakan penguatkuasaan di bawah seksyen 13 AKJS 1997 hanya boleh dibuat setelah Kementerian Dalam Negeri ("KDN") membuat perintah larangan di bawah Akta Mesin Cetak dan Penerbitan 1984 ("Akta Cetak 1984"), dengan mengeluarkan suatu Perintah Kawalan Hasil Penerbitan Tidak Diingini;

(e) suatu deklarasi bahawa oleh kerana penguatkuasaan dalam bentuk Tindakan JAWI dibuat pada 23.5.2012 sebelum KDN membuat sebarang perintah larangan di bawah Akta Cetak 1984, maka tindakan JAWI tersebut adalah tidak sah dan terbatal;

(f) suatu deklarasi bahawa oleh kerana Perintah Mesin Cetak dan Penerbitan (Kawalan Hasil Penerbitan Tidak Dingini) (No. 3) 2012 hanya dibuat oleh KDN dalam Warta Kerajaan P.U.(A) 162 pada 29.5.2012, maka Tindakan JAWI terhadap Pemohon Pertama dan Pemohon Kedua dan semua tindakan susulan dalam tangkapan dan pendakwaan terhadap Pemohon Ketiga adalah tidak sah dan terbatal;

(g) suatu deklarasi bahawa menurut Fasal 121(1) Perlembagaan Persekutuan, Mahkamah yang mempunyai bidangkuasa dan merupakan forum yang layak dan sesuai bagi memberikan tafsiran berkenaan pemakaian Akta Cetak 1984 ke atas AJKS 1997, Akta Pentadbiran 1993, Akta Prosedur 1997 adalah Mahkamah Tinggi Malaya dan bukan Mahkamah Syariah;

(h) suatu deklarasi bahawa oleh sebab perkara yang dinyatakan di perenggan (g) di atas, JAWI tidak boleh membuat atau meneruskan sebarang pendakwaan terhadap Pemohon Ketiga sehinggalah pelupusan Semakan Kehakiman ini;

(i) suatu Perintah bahawa segala prosiding lanjut dalam Tindakan JAWI, tindakan tangkapan dan semua tindakan susulan termasuk pendakwaan ke atas Pemohon Ketiga digantung, sehingga pelupusan akhir dan muktamad permohonan untuk semakan kehakiman ini;

(j) pampasan ditaksirkan di atas aib, trauma, ketakutan, kehilangan, kerugian, kesusahan, kerosakan reputasi dan nama baik yang dialami dan ditanggung oleh Pemohon-Pemohon akibat Tindakan JAWI yang salah ke atas Pemohon Pertama dan Kedua dan tindakan tangkapan dan pendakwaan ke atas Pemohon Ketiga;

(k) bahawa segala arahan dan perintah yang perlu dan berikutan diberi;

(l) bahawa kos-kos dalam permohonan ditanggung oleh responden-responden; dan

(m) relif-relif selanjutnya atau yang lain sebagaimana yang difikirkan sesuai dan berpatutan oleh Mahkamah Yang Mulia ini.

Parties' Arguments

[7] Both parties have put forth very lengthy and persuasive arguments which I summarise as follows:

(i) Respondent's opposition

A The respondents basically rely on s. 13 of the Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559) and item 1 of List II of the Ninth Schedule of the Federal Constitution, read together with cl. 2 of art. 74 of the Federal Constitution; to oppose this application and to support their argument that
B the action taken by them was valid.

It is also the argument of the respondents that the pith and substance of s. 13 of Act 559 is in respect of religious publications contrary to Islamic Law and it is covered by item
C 1, List II of the Ninth Schedule of the Federal Constitution and therefore this court has no jurisdiction to deal with this case which touches on the said s. 13.

Further the respondents also argue that the action of the respondents against the applicants is an action under criminal
D law and not civil law and therefore is not subject to judicial review by this court.

(ii) Applicant's argument

E Briefly, the applicants argue that the respondents cannot imply that the Syariah Court has jurisdiction merely because there is s. 13 of Act 559 which allows them to take enforcement actions when similar offence has been legislated in s. 7 of the Printing, Presses and Publications Act 1984 (Act 301). The
F applicants argue that Act 301 was legislated pursuant to Item 21 of List 1 of the Ninth Schedule read together with cl. 1 of art. 74 of the Federal Constitution and therefore it has superior legislative capacity as compared to Act 559 which is only applicable to the Federal Territories of Kuala Lumpur,
G Labuan and Putrajaya.

Further the applicants contend that what amount to contrary to Islamic Law under s. 13 of Act 559 itself is ambiguous and wide. They argue that the offence specified under the said s. 13 of Act 559 which is a legislation of an offence against
H the precepts of Islam is a legislation upon religious doctrine, and is not criminal law *per se*.

The applicants argue that this court has jurisdiction to review the decision and action of the respondents which are tainted
I with illegality, abuse of discretionary powers or process, irrationally, unreasonableness exercise of power, procedural impropriety and unconstitutionally and therefore are unlawful.

The Relevant Law Involved

[8] Section 13 of Act 559 which read as follows:

> (1) Any person who:
>
> (a) Prints, publishes, produces, records, distributes, or in any other manner disseminates any book, pamphlet, document or any form or recording containing anything which is contrary to Islamic Law; or
>
> (b) Has in his possession any such book, pamphlet, document or recording.
>
> Shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

[9] Section 7(1) of Act 301 which read as follows:

> If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

[10] Issue

(i) Whether this court has jurisdiction to hear this application.

(ii) Whether the respondents' action against the applicants are lawful.

Decision

Whether This Court Has Jurisdiction To Hear This Application

[11] Without doubt, this case involves the review of the respondents' action in raiding and searching the premise of the first applicant and seizing publications therein and examining the applicants and subsequently arresting and prosecuting the third

applicant. The respondents here are also without doubt, are public authorities and the applicants are aggrieved and have been adversely affected by the respondents' actions.

[12] MP Jain in his book, *Administrative Law of Malaysia and Singapore,* 3rd edn at p. 665 had said the following:

> Today, *certiorari* goes not only to a body discharging a quasi-judicial functions, but any body determining the rights of the people. The modern trend is that wherever there is power to determine question affecting the rights of persons, there is a duty to act judicially and such a determination is subject to *certiorari* ... In Malaysia, *certiorari* has been frequently involved to quash the discretionary decision of Minister and other administrative authorities. *Certiorari* has thus emerged into a trend remedy for the central of decisions by the administration affecting rights of persons ...

[13] In a recent case of *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145, the Federal Court had held *inter alia* as follows:

> ... The High Court has a supervisory jurisdiction over proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. This process exercise by the High Court is commonly referred to as 'judicial review'. In brief judicial review provides a means by which judicial control of administrative actions is exercised.

[14] There are many other authorities on this issue; but I feel the above suffice to support the argument that this court has indeed a supervisory power over the decision and act of those bodies like the respondents in this case. The applicants have come to court and pleaded that they have been legally wronged. Therefore it is not correct for this court to just close its eyes and ignore this as it is this court's duty to uphold, protect and ensure that justice is administer in a regular and effective manner according to law.

[15] It must also be highlighted that this application involves the interpretation of laws that relate to fundamental liberties. In *Siti Hasnah Vangarama Abdullah v. Tun Dr Mahathir Mohamad & Ors* [2012] 7 CLJ 845, the Court of Appeal held:

At the outset we wish to stress here that we do not think that it is the law that a subject-matter of a claim or complaint automatically ceases to be within the jurisdiction of the civil Courts just because it has an Islamic law element in it. This is not the intention of Article 121(1A) of the Federal Constitution says. Clause (1A) of Article 121 states:

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

In our view, the correct position in law is that only if the subject-matter of the action is exclusively within the jurisdiction of the Syariah Courts would the subject-matter, by virtue of Article 121(1A) of the Federal Constitution, fall outside the jurisdiction of the civil Courts.

...

In conclusion, we wish to say that a civil High Court must be extremely cautious and slow in declining jurisdiction and in coming to the conclusion that the subject-matter of an action before it falls within the exclusive jurisdiction of the Syariah Courts; particularly, in cases involving the fundamental rights of the subjects. In *Abdul Ghani Haroon v. Ketua Polis Negara* [2001] 2 MLJ 689 it has been said (at p. 697):

> Judges are the protectors of fundamental liberties of the subjects as enshrined in the Constitution. It is a sacred trust that they must vigilantly uphold.

The same sentiment was repeated by the High Court in *Abd Malek bin Hussin v. Borhan bin Hj Daud & Ors* [2008] 1 MLJ 368. Perhaps the following *dicta* could serve as a useful guide to High Court Judges. In *Dato' Kadar Shah Tun Sulaiman v. Datin Fauziah Haron* [2008] 4 CLJ 504 the High Court said:

> In my judgment, where there is an issue of competing jurisdiction between the civil court and the Syariah court, the proceedings before the High Court of Malaya or the High Court of Sabah and Sarawak must take precedence over the Syariah Courts as the High Court of Malaya and High Court of Sabah and Sarawak are superior civil courts, being High Courts duly constituted under the Federal Constitution. Syariah Courts are mere State Courts established by State law, and under the Federal Constitution these State Courts do not enjoy the same status and powers as the High Courts established under the Courts of Judicature Act 1964.

[16] No doubt that Act 559 is the law for Muslim, but that does not take away the jurisdiction of this court to interpret it; as held by the Supreme Court in *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77; [1992] 1 MLJ 1, as follows:

> We are of the view that clear provisions should be incorporated in all the state Enactments to avoid difficulties of interpretation by the civil courts. This is particularly important in view of the amendment to art. 121 of the Federal Constitution made by Act A704 of 1988. The new cl. 1A of art 121 of the Constitution effective from 10 June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the syariah courts. But that clause does not take away the jurisdiction of the civil court to interpret any written laws of the states enacted for the administration of Muslim law.

[17] I also feel the question of whether Act 559 is subject to Act 301 is a matter under the Federal List and for this court to have the jurisdiction over as provided by item 4(k) of List 1 of the Ninth Schedule of the Federal Constitution as follows:

> (k) Ascertainment of Islamic Law and other personal laws for purpose of federal law.

[18] In *Abdul Kahar Ahmad v. Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Interveners)* [2008] 4 CLJ 309, the Federal Court held:

> Nowhere in the Constitution is there a provision that the determination of Islamic Law for the purpose of interpreting the Federal Constitution is a matter for the State Legislature to make law to grant such jurisdiction to the Syariah Court. Hence, there is no such provision in the State Enactments to grant such jurisdiction to Syariah Court. In fact, it cannot be done. On the other hand, item 4(k) of List 1, Federal List of the Ninth Schedule goes further to provide that:
>
> (k) Ascertainment of Islamic Law and other personal laws for purpose of federal law.
>
> is a federal matter.
>
> [18] Reliance was made on the provision of art. 121(1A) of the Constitution. With respect, this article does not confer jurisdiction on syariah courts to interpret the Constitution to the exclusion of this court.

[19] As I have said a number of times, ending with *Latifah* (*supra*), that provision was inserted to avoid a situation as in *Myriam v. Ariff* [1971] 3 LNS 1; [1971] 1 MLJ 265, not to oust the jurisdiction of this court in matters that rightly belong to it. Before the jurisdiction of this court is excluded, it must be shown that the Syariah Court has jurisdiction over the matter first. That is not the case here. In fact, the Constitution provides to the contrary. Article 128(1) of the Federal Constitution provides:

128 (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction.

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

[20] That, in effect, is what the Majlis Agama Islam is saying that Syariah High Court should determine. That is a matter for this court to decide, not the Syariah High Court. Whether the impugned provisions are within the scope that the State Legislature has jurisdiction to make or not and whether they are valid or not, will be decided when we hear the petition.

[19] Further I would also like to refer to the Court of Appeal in *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481 wherein the effect of art. 121(1A) of the Federal Constitution and Act 559 was discussed. Gopal Sri Ram JCA (as he then was) at p. 496 had this to say:

In our view, this part of the appeal turns upon the true interpretation that art. 121(1A) is to receive. Does cl. (1A) to art. 121 mean that the ordinary courts are to have no jurisdiction over all matters, including offences under the Penal Code committed by persons professing the religion of Islam, which are also within the jurisdiction of the Syariah Court? Or, does it mean that the former are not to have jurisdiction over only those matters which are within the exclusive jurisdiction of the latter?

[20] After examining the legislative history of art. 121(1A) and various authorities, the learned judge concluded at p. 497 as follows:

> Accordingly, in the light of the authorities we have referred to earlier in this judgment, we have come to the conclusion that the expression "jurisdiction of the Syariah courts" refers to "the exclusive jurisdiction" of those courts. In other words, if a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code and the Act, then the Courts referred to in art. 121(1) will have jurisdiction to try such an offence. It is only in respect of offences under the Act that a Syariah Court may have exclusive jurisdiction. For example, the offence of adultery which is prescribed as an offence under the Act has no equivalent in the Penal Code or other Federal criminal statute. So, if a person professing the religion of Islam commits adultery, then, he or she may be tried only in a Syariah court.

[21] The offence proscribed by s. 13 of the Act 559 is not exclusively within the jurisdiction of the Syariah Court but can also be found in s. 7 of the Act 301. Therefore applying the above principle, this court has jurisdiction to also deal with it, even though that is not an issue here. As submitted by the learned counsel for the applicants, while Act 559 applies only to the Federal Territories of Kuala Lumpur and Labuan, and to people professing the religion of Islam, the Act 301 applies throughout and beyond Malaysia. It applies to every person irrespective of race, sex or religion.

[22] In submitting that s. 13 of the Act 559 is constitutional, learned SFC refers to Item 1 List II of the Ninth Schedule (see para. 5.2, 5.3 and 5.4) which provides as follows:

> Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the DEFINITION and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution. Organization and procedure of Syariah courts, which

> shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

[23] With due respect to the learned SFC, I agree with the learned counsel for the applicants that upon a clear and full reading of item 1 List II, Ninth Schedule FC, it would reveal an important exception that the State cannot enact laws in regard to matters included in the Federal List, which I shall again discuss later.

[24] On the arguments that the action of the respondents against the applicants is an action under criminal law and not civil law and therefore it is not open to be judicially reviewed by this court, I would like to refer to the Federal Court decision in *Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases* [2009] 2 CLJ 54; [2009] 6 MLJ 354, as follows:

> ... it is not easy to draw the dividing line between 'criminal law' and the offences that may be created by the State Legislature. Every offence has a punishment attached to it. In that sense, it is 'criminal law'. However, if every offence is 'criminal law' then, no offence may be created by the State Legislatures pursuant to item 1, List II of the Ninth Schedule. To give effect to the provision of the Constitution a distinction has to be made between the two categories of offences and a line has to be drawn somewhere. The dividing line seems to be that if the offence is an offence against the precept of Islam, then it should not be treated as 'criminal law'. That too seems to be the approach taken by the Supreme Court judgment in *Mamat bin Daud & Ors v. Government of Malaysia* [1988] 1 MLJ 119. In that case the issue was whether s. 298A of the Penal Code was invalid on the ground that it made provisions with respect to a matter with respect to which Parliament had no power to make ...
>
> Salleh Abas LP who delivered one of the majority judgments said:
>
> ...
>
> Surely, a legislation to deny a muslim from holding a certain view or to prevent him from adopting a practice consistent with that view is legislation upon religious doctrine. In its applicability to the religion of Islam, the

A impugned section must, in my view, be within the competence of State Legislative Assemblies only. See item 1 (of) List II of the Ninth Schedule to the Constitution.

...

B In the instant case, as the offences are offences against the precept of Islam, as there are no similar offences in the federal law and the impugned offences specifically cover muslims only and pertaining to Islam only, clearly it cannot be argued that they are 'criminal law' as envisage by the Constitution.

C **[25]** The offence specified under s. 13 of Act 559 – which is a legislation of an offence against the precepts of Islam is a legislation upon religious doctrine and is therefore not a criminal law unlike Printing Act etc. Hence, the argument that the action taken by the respondents against the applicants is criminal in D nature and cannot be judicially reviewed by the court, with due respect, cannot hold water.

[26] To conclude, based on the above, I am satisfied that this court has clear jurisdiction to hear this application under O. 53 E Rules of Court 2012. To me, the question of this court encroaching into the jurisdiction of Syariah Court does not arise at all.

Whether The Respondents' Action Against The Applicants Are Lawful

F **[27]** The three applicants are a company, a non-Muslim and a Muslim respectively. Section 1(2) of Act 559 clearly provides that the Act shall apply to "persons professing the religion of Islam". Although the word "persons" is not defined, the word "Muslim" is defined in the Administration of Islamic Law (Federal Territory) G Act 1993 (Act 505) under s. 2 as follows:

(a) a person who professes the religion of Islam;

(b) a person either or both of whose parents were, at the time of the person's birth, Muslims;

H

(c) a person whose upbringing was conducted on the basis that he was a Muslim;

(d) a person who has converted to Islam in accordance with the requirements of section 85;

I

(e) a person who is commonly reputed to be a Muslim; or

(f) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be verbal or written.

[28] Upon reading s. 46 of Act 505 it is clear that it confers criminal and civil jurisdiction to the Syariah High Court over Muslim only.

[29] In *Potensi Bernas Sdn Bhd v. Datu Badaruddin Datu Mustapha* [2009] 8 CLJ 573, the High Court was required to determine whether to declare, among others, that the plaintiff, a company incorporated under the Companies Act 1965, and an island property bought under the plaintiff's name could fall under the jurisdiction of the Syariah Court. The court answered in the negative, holding that a company could not be a Muslim, or have a religion:

... In my view the Civil Court is only precluded from interfering if the Syariah Court had acted within its jurisdiction. It is not a blanket prohibition. In the present case it is clear that the Syariah High Court had no jurisdiction to grant the injunction order as the property is located outside the State of Sabah and involving a non Muslim owner.

...

There is no dispute that the plaintiff company consists of both Muslim and non Muslim shareholders. In fact the majority shareholder is a non Muslim. The defendant's contention that the Syariah High Court has jurisdiction over the plaintiff is based solely on the fact that Datu Amir Kahar, a shareholder in the company is a Muslim. This argument is untenable. Clearly the property is not the personal property of Datu Amir Kahar. It is not even registered in his name. It belongs to the company which, being a creature of statute does not profess any religion. Only natural persons can profess a religion. Therefore the injunction order {by the Syariah court} restraining the plaintiff from dealing with the property is not only manifestly unjust to the non Muslim shareholders of the plaintiff but is also null and void for want of jurisdiction.

[30] In *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253 the Federal Court held at para [49]:

[49] Until the problem is solved by the legislature, it appears that the only way out now is, if in a case in the civil court, an Islamic law issue arises, which is within the jurisdiction of the syariah

court, the party raising the issue should file a case in the syariah court solely for the determination of that issue and the decision of the syariah court on that issue should then be applied by the civil court in the determination of the case. But, this is only possible if both parties are Muslims. If one of the parties is not a Muslim such an application to the syariah court cannot be made. If the non-Muslim party is the would-be plaintiff, he is unable even to commence proceedings in the syariah court. If the non-Muslim party is the would-be defendant, he would not be able to appear to put up his defence. The problem persists. Similarly, if in a case in the syariah court, a civil law issue eg, land law or companies law arises, the party raising the issue should file a case in the civil court for the determination of that issue which decision should be applied by the syariah court in deciding the case.

[31] Applying the above principles to the instant case, I am of the view that since Syariah laws are not applicable to non-Muslim, the action taken by the first respondent's against the first and second applicants were clearly unlawful and in excess of their powers. The action is also irrational as how could they investigate the second applicant in relation to an offence pertaining to publications contrary to Islamic law, despite being aware that:

(i) the second applicant is a non-Muslim; and

(ii) therefore could not be assumed to have sufficient knowledge of Islamic Law or of what is contrary to Islamic Law?

[32] Refer to *Counsel of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[33] Now, on action against the third applicant; it cannot be disputed that the third applicant is a Muslim. However, does that alone justify the first respondent's action against her?

[34] She is merely a store manager, and the actual person who is responsible for the selection of titles and range of stock of books and publications displayed and sold in the first applicant's bookstore is the second respondent and not her. This fact has not been disputed by the respondents. Being subordinate to the second applicant, she has no authority whatsoever to decide on the selection or distribution of any books or publication in the first applicant bookstore; and yet the first respondent continued to prosecute even when the above facts had been made known to

them during the investigation at the first respondent's office on 30 May 2012; as deposed in the applicant's first affidavit. This clearly shows that the respondents' decisions and exercise were so unreasonable and again, irrational.

[35] Matters pertaining to publications, printing and printing presses fall within Item 21 of List 1 of the Ninth Schedule read together with art. 74 of the Federal Constitution. If we look at Item 1 of List II of the Ninth Schedule, the state is given power to create and punish offences by persons professing the religion of Islam against precept of Islam, except in regard to matters included in the Federal List. No doubt the creation and punishment of offences against the precepts of Islam can be enacted by the State Legislature. However, I must again emphasise, clear reading of item 1 of List II of the Ninth Schedule as I mention just now, shows that the state cannot enact laws in regard to matters included in the Federal List. Since matters pertaining to publications, printing and printing presses fall within List I ie, the Federal List, validity of s. 13 of Act 559 is questionable as it seems to be *ultra vires* the Act 301 and the Federal Constitution.

[36] Even if it is a valid law, what amounts to "contrary to Islamic Law" as provided by that provision is also questionable as it is too wide. Members of public must be made known what publication is contrary to Islam law or precept of Islam. Otherwise, as the learned counsel for the applicants has submitted, a Muslim employee who works in a bookstore that also sells Christianity Bibles, books on Buddhism or Hinduism or any other religion besides other books, we do have many such bookstores now, would be committing an offence.

[37] Hence there need to be notification by the respondents as to what books and publications are contrary to Islamic Law. It must be noted that at the material time, the publication or book in question was not subject to any publications order by KDN. The publication order was issued only three weeks after the raid. This court must bear in mind the provision of art. 7 of the Federal Constitution which provides that no person shall be punishable for an act or omission which was not punishable by law when it was done or made. Section 13 of the Act 559 must be in conformity with the Federal Constitution especially the said art. 7. The Court

of Appeal in *Multi-Purpose Holdings Berhad v. Ketua Pengarah Hasil Dalam Negeri* [2006] 1 CLJ 1121 had observed that Parliament does not intend its Act to violate the constitution. Hence, a statute must be read harmoniously with the constitution to avoid any conflict between them which will result in the statute becoming void. Therefore, the Act must be read prospectively to prevent the appellant in that case and those similarly circumstanced from being retrospectively criminally liable.

[38] Further there is nothing in the said Act 559 which provides for any state religious bodies to prohibit any publication. It only creates an offence of publication. In order to follow and adopt a harmonious interpretation of the laws, the only logical approach is for s. 7 of the Act 301 to support s. 13 of the Act 559 ie, notification to the public first than only the enforcement action. We live in a multi-religious and multi-racial society. Such approach in my opinion, would be harmonious and avoids any tension, controversy and conflict in our society and law. Refer to *Sukma Darmawan*'s case (*supra*); the Court of Appeal in *Multi-Purpose Holdings Berhad v. Ketua Pengarah Hasil Dalam Negeri* [2006] 1 CLJ 1121 and also the Federal Court decision in *Tan Sri Eric Chia Eng Hock v. PP* [2007] 1 CLJ 565.

[39] Applying that principle, as it stands now, I am of the opinion that the criminal charge against the third applicant in the Syariah High Court is an infringement of art. 7 which is a provision concerning fundamental liberties, guaranteed by our Federal Constitution.

[40] I also must state here that I agree with the learned counsel for the applicant when he submits that the second respondent, by the averments in his affidavit, has abdicated his duties when he stated that the first respondent can perform seizures without any prohibition order from the KDN, as s. 7 of Act 301 clearly states that the powers of prohibition with respect to publication lies with the Honourable Minister of Home Ministry. Hence, there is a procedural impropriety here which warrant a judicial review.

[41] To conclude, on this second issue, for the reasons that I have stated, I view the respondents' action against the applicants as unlawful.

Conclusion

[42] I have perused the cause papers and scrutinised submissions made by the parties. I am satisfied that the applicants have shown existence of illegality, abuse of discretionary powers, irrationality, unreasonable exercise of power, unconstitutionally and that there exists procedural impropriety on the part of the respondents. Looking at the whole scenario of the case, it is hard not to agree with the applicants that there are elements of *mala fide* in the handling and carrying out of the actions of the respondents. In law, *mala fide* can be inferred when there was absence of care, caution and a proper sense of responsibility. In *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister Of Home Affairs), Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129, the Federal Court held:

> … *Mala fides* does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, ie, for a purpose other than the purpose for which it is professed to have been exercised …
>
> … the words appear to have an extended meaning "in the serious matter of depriving a citizen of his liberty without trial … "
>
> In this connection want of good faith, of course, means no more than that, in the serious matter of depriving a citizen of his liberty without trial, there was absence of care, caution and a proper sense of responsibility. On this interpretation of *mala fides* there is no difference of opinion …
>
> … If it was true that the order came to be made in a casual or cavalier fashion, it cannot properly be said that the Cabinet or the Minister concerned had been "satisfied". On the other hand, if the decision was made upon a proper evaluation of the facts and surrounding circumstances and after due deliberation, that was all which could be required for the issue of an order based on subjective satisfaction. In the final analysis, the issue is one of fact …

[43] The existence of *mala fide* on the part of the respondents can be seen from their following action:

(a) On the part of the first respondent when they exercised their dominant position and enforcement powers for a collateral purpose by:

A (i) prosecuting the third applicant, who is a Muslim, when they could not do so against the first applicant (as the corporate owner of Borders bookstore) or the second applicant (as the person responsible over the display and sale of the publications, and who as a non-Muslim could
B not be prosecuted under the Act 559).

(ii) conducting enforcement actions, despite there being no prior prohibition order issued by KDN, and arresting and prosecuting the third applicant for what was a non-offence
C at the time of the raid.

[44] It can also be inferred when the third applicant was deprived of her liberty without due care, caution and responsibility, when the first respondent arresting and prosecuting her despite knowing that she was neither the owner of the bookstore; nor had control
D over the selection of publications therein.

[45] On the part of the second respondent, *mala fide* is inferred when he made an order in a casual or cavalier fashion, in rushing the prohibition order to prohibit the publications, almost as an
E afterthought, ie, only after the enforcement actions by the first respondent on 23 May 2012 and 24 May 2012, and thus it cannot be said that the Minister concerned had been properly "satisfied" or had considered the full circumstances of the case in a rational and thoughtful manner as would be required of him
F under s. 7 of the Printing Act.

[46] The second respondent and the third respondent can also be said to have acted *mala fide* by acting without due care, caution and responsibility in failing to use their dominant position
G over the first respondent or omission to coordinate law enforcement measures in a rational manner to ensure harmony, peace and security between Muslim and non-Muslim communities and in failing to provide guidance to the first respondent on law enforcement measures.

H **[47]** I have taken into consideration all those reasons and on those grounds I allow this application in prayer (a) to (i) of encl. 6. The applicants agree that the court makes no order as to cost and I therefore make no order as to cost.

I